Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–191 OF 2009
HANIFAH FARIKULLAH JC
10 JUNE 2011

Contract — Damages — Assessment — Breach of contract — Whether Malaysian or English law was applicable to assessment of damages — Whether court should give effect to choice of law clause in contract — Whether plaintiff was entitled to recover general damages as claimed — English Sale of Goods Act 1979 s 50(1), (2) & (3) — Sale of Goods Act 1957 s 56 — Contracts Act 1950 s 74

The defendant and Marinehub entered into a binding fixed price contract ('the FPC'), under which Marinehub was to supply and deliver a total of 102,600mt of marine fuel oil ('fuel oil') to the defendant at the fixed price of USD559.80/mt ('the FPC price'). Under the terms of the contract, the defendant was to take delivery of 34,200mt of fuel oil for each of the months of October, November and December 2008 at the FPC price. It was also a term of the FPC that the contract was governed by English law. At the same time, Marinehub entered into a FPC with the plaintiff for the purchase of the same quantity of fuel oil for each of the months of October, November and December 2008 at a fixed price for delivery to the defendant's vessels. However, when the price of fuel oil dropped in October 2008, the defendant attempted to resile from its contractual obligation under its FPC with Marinehub by insisting on paying the lower Means of Platts Bunkerwire price ('MPB price'), a fluctuating market price, instead of the FPC price. The defendant also purported to terminate the FPC without accepting the deliveries of fuel oil for November and December and then attempted to enter into a new contract for November and December 2008 at the spot price. The plaintiff, as Marinehub's assignee, accepted the defendant's wrongful repudiation of the FPC and sought damages from the defendant for breach of contract and wrongful repudiation of the FPC. The High Court held the defendant liable to the plaintiff with damages to be assessed. This judgment on liability was upheld by the Court of Appeal. The present proceedings related to the assessment of damages that could be validly claimed by the plaintiff. It was the plaintiff's case that since the substantive contract between the parties was governed by English law, the damages that it was entitled to recover was also to be determined in accordance with the principles of English law. The defendant denied the applicability of English law and contended that although English law applied to the substantive issues under the contract, procedural or remedial issues, which included the issue of damages, ought to be determined based on the law of the jurisdiction of the parties, which in this case was Malaysia. The plaintiff's

expert witness was of the opinion that the plaintiff as an innocent seller was entitled to claim general damages for non-acceptance of goods by the defendant buyer under s 50(2) and (3) of the English Sale of Goods Act 1979 ('the English SOGA') or alternatively special damages of loss of profits and legal liability. The main issue for determination in the present case was thus whether Malaysian or English law was applicable to the assessment of damages.

Held, allowing the plaintiff's claim with interest and costs:

(1) It is settled law that a choice of law clause in the contract did not prevent the Malaysian courts from having the jurisdiction and ability to adjudicate on the assessment of damages. At the same time, this court was inclined to agree with the plaintiff's expert witness' opinion that the plaintiff was entitled to recover from the defendant damages based on the differential in the market price and the FPC price. Under s 50(3) of the English SOGA, if there was an available market and a buyer wrongly failed to accept the goods, as in the present case, the seller's damages were calculated by deducting the contract price from the market price at the time and place fixed by the contract for acceptance. Hence, the defendant's liability was for the difference between the FPC price and the market price at the time and place (ie Singapore) as fixed by the FPC for acceptance of the fuel oil (see paras 45–49).

(2) Section 50(1) of the English SOGA was identical to s 56 of the Malaysian SOGA 1957. Although the Malaysian SOGA did not provide the equivalent s 50(2) and (3) of the English SOGA, the end result was the same under Malaysian law and English law by reason of s 74 of the Contracts Act 1950 ('the CA'). This position was further supported by Malaysian case law. Hence, under s 56 of the Malaysian SOGA and s 74 of the CA, the heads of damages recoverable would be the market differential between the contract price and the market price prevailing at the time of the breach. In any case, this court accepted the plaintiff's argument that as the parties had expressly chosen English law as the proper law of the contract, this court should give effect to this contractual choice by applying the English route in determining the heads of damages. Thus the plaintiff was entitled to damages as prayed for in its amended statement of claim, pursuant to s 50(3) of the English SOGA (see paras 51 & 54–59).

(3) In the present case, the court also needed to consider the appropriate time at which the fuel oil was established as being available, to determine the proper price to be ascertained as the market price. In this regard the court accepted the evidence of the plaintiff that it would take a reasonable trader two to three weeks to dispose of the 34,200mt of fuel oil unlifted by the defendant for each of the affected months (see paras 60–63).

(4) In determining which of the two published rates to adopt in computing

the amount payable by the defendant in damages, this court was of the view that based on the circumstances of this case, it would be more appropriate to use the MPB index instead of the marketscan index, claimed by the plaintiff. The court found that there was no credible evidence adduced by the plaintiff to suggest that the marketscan index was more likely to be used than the other (see paras 64 & 68–71).

(5) The court found that the plaintiff had established its claim for general damages and thus awarded it a total of USD25,246,233.17 under this head of damages with interest and costs (see paras 72–74).

[Bahasa Malaysia summary

Defendan dan Marinehub memasuki kontrak harga tetap yang mengikat ('KHT'), yang di bawahnya Marinehub sepatutnya membekalkan dan menghantar sejumlah 102,600mt bahan api marin kepada defendan pada harga tetap USD559.80/mt ('harga KHT'). Di bawah terma kontrak tersebut, defendan sepatutnya menerima 34,200mt bahan api bagi setiap bulan Oktober, November dan Disember 2008 pada harga KHT. Adalah juga terma KHT bahawa kontrak tersebut tertakluk kepada undang-undang Inggeris. Pada masa yang sama, Marinehub memasuki KHT dengan plaintif untuk membeli kuantiti bahan api yang sama untuk setiap bulan-bulan Oktober, November dan Disember 2008 pada harga yang ditetapkan untuk penghantaran ke kapal defendan. Walau bagaimanapun, apabila harga bahan api jatuh pada bulan Oktober 2008, defendan cuba untuk membingkas daripada tanggungjawab kontraknya di bawah KHT dengan Marinehub dengan mendesak untuk membayar harga 'Means of Plats Bunkerwire' ('harga MPB') yang rendah, harga pasaran yang berubah-ubah, dan bukan harga KHT. Defendan juga bertujuan untuk membatalkan KHT tanpa menerima penghantaran bahan api bagi bulan November dan Disember dan kemudian mencuba memasuki kontrak baru bagi bulan November dan Disember 2008 pada harga semasa. Plaintif, sebagai pemegang serah hak Marinehub, menerima pembatalan secara salah KHT oleh defendan dan memohon ganti rugi daripada defendan terhadap kemungkiran kontrak dan pembatalan salah KHT. Mahkamah Tinggi memutuskan defendan bertanggungjawab kepada plaintif dengan ganti rugi ditaksir. Penghakiman ini atas liabiliti yang disahkan oleh Mahkamah Rayuan. Prosiding ini berkaitan dengan penilaian ganti rugi yang boleh dituntut secara sah oleh plaintif. Adalah kes plaintif bahawa oleh sebab kontrak substantif pihak-pihak tertakluk kepada undang-undang Inggeris, ganti rugi yang ia berhak dapatkan semula adalah juga perlu ditentukan berikutan prinsip undang-undang Inggeris. Defendan menafikan aplikasi undang-undang Inggeris dan menghujah bahawa walaupun undang-undang Inggeris terpakai kepada isu-isu substantif di bawah kontrak, isu-isu prosedur dan remedi, yang termasuk isu ganti rugi, perlu dipertimbangkan berdasarkan kepada undang-undang bidang kuasa pihak-pihak, yang dalam kes ini adalah Malaysia. Saksi pakar plaintif

berpendapat bahawa plaintif sebagai penjual yang tidak bersalah berhak untuk menuntut ganti rugi am kepada ketidakterimaan barangan oleh pembeli defendan di bawah s 50(2) dan (3) English Sale of Goods Act 1979 ('English SOGA') atau secara alternatifnya ganti rugi khas bagi kerugian keuntungan dan liabiliti undang-undang. Isu utama untuk pertimbangan dalam kes ini dengan itu adalah, sama ada undang-undang Malaysia atau Inggeris yang terpakai untuk penilaian ganti rugi.

Diputuskan, membenarkan tuntutan plaintif dengan faedah dan kos:

(1) Adalah undang-undang matan bahawa pilihan klausa undang-undang di dalam kontrak tidak menghalang mahkamah Malaysia daripada mempunyai bidang kuasa dan keupayaan untuk menghakimi penilaian ganti rugi. Pada masa yang sama, mahkamah ini cenderung untuk bersetuju dengan pendapat saksi pakar plaintif bahawa plaintif berhak untuk mendapatkan semula daripada defendan ganti rugi berdasarkan perbezaan harga pasaran dan harga KHT. Di bawah s 50(3) English SOGA, jika terdapat pasaran dan pembeli secara salah gagal menerima barangan, seperti di dalam kes ini, ganti rugi penjual dikira dengan menolak harga kontrak daripada harga pasaran pada masa dan tempat yang ditetapkan oleh kontrak untuk penerimaan. Maka, liabiliti defendan adalah bagi perbezaan antara harga KHT dan harga pasaran pada masa dan tempat (iaitu Singapura) seperti yang ditetapkan oleh KHT untuk penerimaan bahan api tersebut (lihat perenggan 45–49).

(2) Seksyen 50(1) English SOGA adalah sama dengan s 56 SOGA 1957 Malaysia. Walaupun SOGA Malaysia tidak memperuntukkan s 50(2) dan (3) yang sama dengan English SOGA, hasilnya adalah sama di bawah undang-undang Malaysia dan undang-undang English disebabkan oleh s 74 Akta Kontrak 1950 ('AK'). Kedudukan ini disokong lanjut oleh kes-kes Malaysia. Maka, di bawah s 56 SOGA Malaysia dan s 74 AK, tajuk ganti rugi yang boleh diperoleh semula adalah perbezaan pasaran di antara harga kontrak dan harga pasaran yang wujud pada masa kemungkiran. Walau apa pun, mahkamah ini menerima hujahan plaintif bahawa oleh sebab pihak-pihak telah menerima secara langsung undang-undang Inggeris sebagai undang-undang yang wajar bagi kontrak tersebut, mahkamah ini sepatutnya memberikan kesan kepada pilihan kontrak ini dengan menguna pakai undang-undang Inggeris dalam menentukan tajuk ganti rugi. Oleh demikian plaintif berhak kepada ganti rugi seperti yang dipohon di dalam penyata tuntutan dipindanya, menurut s 50(3) English SOGA (lihat perenggan 51 & 54–59).

(3) Di dalam kes ini, mahkamah juga perlu mempertimbangkan masa yang sesuai di mana bahan api disahkan terdapat dalam pasaran, untuk menentukan harga yang wajar ditentukan sebagai harga pasaran.

Berkaitan dengan ini mahkamah menerima keterangan plaintif bahawa ia akan mengambil peniaga yang munasabah selama dua hingga tiga minggu untuk melupuskan 34,200mt bahan api yang tidak diterima oleh defendan bagi setiap bulan yang terlibat (lihat perenggan 60–63).

(4) Dalam menentukan yang mana daripada dua harga yang diterbitkan untuk mengira jumlah yang perlu dibayar kepada defendan sebagai ganti rugi, mahkamah berpendapat bahawa berdasarkan kepada keadaan kes ini, adalah lebih munasabah untuk menggunakan indeks MPB dan bukan indeks imbasan pasaran, yang dituntut oleh plaintif. Mahkamah mendapati bahawa tiada keterangan yang boleh dipercayai dikemukakan oleh plaintif yang menyarankan bahawa indeks imbasan pasaran adalah lebih berkemungkinan digunakan daripada yang satu lagi (lihat perenggan 64 & 68–71).

(5) Mahkamah mendapati bahawa plaintif telah membuktikan tuntutannya bagi ganti rugi am dan dengan itu mengawardkan sejumlah USD25,246,233.17 di bawah tajuk ganti rugi ini dengan faedah dan kos (lihat perenggan 72–74).]

Notes

For cases on assessment, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3900–3911.

Cases referred to

Aercap Partners v Avia Asset Management [2010] EWHC 2431 (refd)

American Express International Banking Corp v Tan Loon Swan [1992] 1 MLJ 727, SC (refd)

Boys v Chaplin [1971] AC 356, HL (refd)

Chan Kwon Fong & Anor v Chan Wah [1977] 1 MLJ 233, FC (refd)

East Asiatic Co Ltd v Othman [1966] 2 MLJ 38 (refd)

Hadley v Baxendale (1854) 9 Ex 341 (refd)

Hall v Pim (1928) 30 Ll L Rep 159, HL (refd)

James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party) [1996] 2 MLJ 97, HC (refd)

J D'Almeida Araujo Lda v Sir F Becker & Co [1953] 2 QB 329 (refd)

Jupiter Ltd v Lim Kin Tong (Trading as Conrad International Treasury Casino) [2005] MLJU 534; [2006] 5 CLJ 277, HC (refd)

Lee Heng & Co v C Melchers & Co [1963] 1 MLJ 47, CA (refd)

Livesley v Horst [1924] SCR 605, SC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Petrotrade v Stinnes [1995] 1 Lloyd's Rep 142 (refd)

Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor [2011] 2 MLJ 59, HC (folld)

Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 396, HC (refd)
Westbrook Resources Ltd v Globe Metallurgical Inc [2007] EWHC 2353 (Comm), CA (refd)

Legislation referred to

Civil Law Act 1956 s 13, 74, 74(1) Illustrations (c), (d), (o)
Contracts Act 1950 s 26(2), (4)
Evidence Act 1950 s 45
Sale of Goods Act 1957 s 56
Sale of Goods Act 1979 [UK] s 50(1), (2), (3)

Sitpah Selvaratnam (Siti Rahayu Mumazaini with him) (Tommy Thomas) for the plaintiff.
Raja Eileen Soraya bt Raja Aman (Raja, Darryl & Loh) for the defendant.

Hanifah Farikullah JC:

INTRODUCTION

[1] Judgment on liability was entered against the defendant by the High Court on 23 September 2009 and damages are to be assessed. This judgment on liability was upheld by the Court of Appeal on 6 July 2010.

[2] Thus, the proceedings before this court are limited to issues relating to assessment of damages that can be validly claimed by the plaintiff.

THE PLAINTIFF'S CLAIM

[3] In this present case the plaintiff claims:

(a) damages in the sum of USD27,517,211.47 as pleaded in its amended statement of claim or such other sum as this court may assess or find proper;

(b) interest on all sums payable by the defendant at the rate of 8%pa from 19 November 2008 to the date of final payment; and

(c) costs.

AGREED FACTS

[4] The following are the salient facts that are not in dispute:

(a) on 10 September 2008, the defendant issued an open invitation to bid

('ItB') for the supply of marine fuel oil ('MFO'), towards concluding a bunker fixed price agreement — TCM45/2008;

(b) by the ItB, the defendant invited tenders for the supply of 102,600 mt ±5% operational tolerance level (basis 34,200 mt monthly) of MFO, for a period from 1 October 2008 to 31 December 2008;

(c) Marinehub submitted its bid for the supply and delivery of MFO at the price of USD560/mt. This price was later revised to USD559.80/mt ('the FPC price');

(d) the defendant accepted Marinehub's bid for the supply and delivery of MFO, by a letter of award dated 16 September 2008 ('the letter of award'). The letter of award was duly accepted by Marinehub on 17 September 2008;

(e) a binding contract for the supply and delivery of 102,600 mt MFO ±5% operational tolerance level at the total price of USD57,435,480, on the monthly basis of 34,200mt from 1 October 2008 to 31 December 2008 at the fixed FPC price of USD559.80/mt, was accordingly concluded between the defendant and Marinehub, incorporating Part I and Part II of the ItB and the letter of award as the terms of the FPC. The delivery of the MFO was to be in Singapore;

(f) the defendant took 18 separate deliveries amounting to a total of 20,334.59mt of MFO under the FPC for the month of October 2008;

(g) there remained 13,865.174 mt MFO for the defendant to accept delivery of under the FPC, in October 2008;

(h) a dispute arose as to the defendant's alleged entitlement to carry forward from October 2008 the 13,865 mt MFO for delivery in November 2008, at the 'Means Platts Bunkerwire at the contracted port on delivery date' by virtue of cl 3.3 of the FPC, rather than the FPC price of USD559.80/mt Means of Platts Bunkerwire rate is a fluctuating market rate;

(i) on 10 October 2008, the defendant sought to place two orders for MFO, amounting in total to 2,950mt, under PO Ref No FPOCT08BK019 ('Order 19') and PO Ref No FPOCT08BK020 ('Order 20') for delivery to the defendant's vessels MV WAN HAI 605, and MV BUNGA MAS 9 respectively at Means of Platts Bunkerwire rate, as opposed to the FPC Price of USD559.80/mt;

(j) Marinehub informed the defendant on 11 November 2008 that it was ready and willing to deliver the required MFO under Order 19 and Order 20 provided the price payable by the defendant was the FPC price of USD559.80/mt. Marinehub was, ready to supply and deliver MFO to

the defendant Means Platts Bunkerwire price, provided the price differential as compared with the FPC Price was paid by the defendant;

(k) the defendant received notice of the assignment of all Marinehub's interest in the FPC to the plaintiff on 13 November 2008;

(l) the defendant purported to terminate the FPC by its email dated 14 November 2008 to Marinehub on the alleged grounds that Marinehub failed to confirm Order 19 and Order 20;

(m) the plaintiff accepted the defendant's wrongful repudiation of the FPC, thereby bringing the FPC to an end; and sought damages from the defendant for breach of contract and wrongful repudiation of the FPC;

(n) as a consequence of the defendant's termination of the FPC, the defendant also failed to accept delivery of the contracted quantities of MFO for the months of November and December 2008; and

(o) cl 13.1 of the FPC expressly provides that the FPC is governed by English law.

THE JUDGMENT OF THE COURT OF APPEAL

[5] The Court of Appeal by judgement dated 6 July 2010 made the following findings:

(a) that the FPC was entered into between the defendant and Marinehub on 16 September 2008;

(b) that the letter of award imposes an obligation on the defendant to take delivery of a specific quantity of 34,200 mt MFO for each of the months of October, November and December 2008;

(c) that the incomplete cl 3.3 on the carry forward of unutilised MFO to the following month at Means of Platts Bunkerwire price prevailing on the date of delivery, as opposed to the price under the FPC, was never intended to apply to a fixed term, fixed price and fixed quantity contract, and cl 3.3 is irrelevant and inapplicable to the FPC;

(d) that the FPC was entered into arising from the letter of award, upon the defendant's initiative to invite the most competitive bid to control and fix the defendant's MFO costs over the future months of October, November and December 2008. It would be legally and commercially unacceptable to Marinehub, and unreasonable for the defendant to place MFO Orders 19 and 20, for delivery at the Means of Platts Bunkerwire rates as opposed to the FPC price of USD 559.80 per mt;

(e) that the FPC, by its very term and purpose, was to ensure the supply of

MFO at a fixed price and at a total award price of USD 57,435,480. This was to provide certainty of the price the defendant would have to pay for MFO over the three months period and the price the supplier can expect to receive for its three months supply;

(f) that the business exigencies of a fixed price contract requires parties to lock the price for the supply of MFO at a fixed rate, for a fixed period;

(g) that simulteneously and back to back with the FPC, Marinehub to the knowledge of the defendant entered into a fixed price contract with the plaintiff for the purchase of the same quantity of MFO for each of the months of October, November and December 2008 at a fixed price for delivery to the defendant's vessels; and

(h) that the price of MFO dropped in October and November 2008 and the defendant attempted to resile from its contractual obligation under the FPC by insisting on paying the lower Means of Platts Bunkerwire price for the unutilised October quantities and then wrongfully purported to terminate the FPC without accepting the quantities for November and December 2008. The defendant then attempted to enter into a new contract for November and December 2008 at the spot price.

ISSUES FOR DETERMINATION

[6] The issues for determination are as follows:

(a) what law governs the recoverability of the damages that are to be assessed;

(b) what heads of damages does the governing law award to an innocent seller for non-acceptance of goods by a defaulting buyer; and

(c) what is the computation of loss under the recognised heads of damages.

THE PLAINTIFF'S CASE

[7] It is the plaintiff's position that damages are to be assessed in accordance with English law. Under s 50(3) of the Sale of Goods Act 1979 of the United Kingdom, in cases of breach of contract for non-acceptance of goods when there is an available market damages are assessed on the price difference between the contract price and the market price at the time and place when the goods ought to have been accepted. As there may not be an immediate market for the whole quantity of the goods at the time of breach, a reasonable period of time may be afforded to dispose the goods. The price of the goods over this period of time, provides the average market price of the available market.

[8] According to the plaintiff, there is an available market for MFO in Singapore, and the market rates are published as the Platts Bunkerwire index of rates or the Means of Platts Marketscan index of rates. The Means of Platts Marketscan is considered the more appropriate index of rates.

[9] Damages can properly be assessed based on the difference between the contract price of MFO under the Marinehub/the defendant FPC and the average market price derived from Means of Platts Marketscan for Singapore; over the period of time that it could have taken a reasonable supplier to dispose the relevant quantities of MFO that were not accepted by the defendant, as pleaded in para 11 of the amended statement of claim, amounting to USD27,517,211.47 comprising:

(a) USD4,253,003.47 based on the average market price for the period of disposal from 1 november 2008 to 7 November 2008 for the October quantity; and

(b) USD23,264,208.00 based on the average market price for the period of disposal from 14 November 2008 to 14 december 2008 for the November quantity and the December quantity.

[10] Alternatively, the plaintiff contended that the court may consider that the MFO should have been disposed immediately in the market on or about Friday, 14 November 2008, when the defendant gave notice of the termination of the FPC. Damages may be assessed as the difference between the contract price of MFO under the Marinehub/the defendant FPC and the average market price derived from Means of Platts Marketscan at Singapore relevant to the dates of breach and wrongful termination by the defendant, as is pleaded in para 12 of the amended statement of claim, amounting to USD25,234,827.12 comprising:

(a) USD2,336,559.12 based on the average market price in October 2008 for the October quantity; and

(b) USD22,898,268 based on the average market price on 14 November 2008 and 17 November 2008 for the November quantity and the December quantity.

[11] The third alternative claim is based on the date fixed for delivery of the goods, giving rise to the difference between the contract price of the MFO under the Marinehub/the defendant FPC and the average market price derived from Means of Platts Marketscan at Singapore for each of the months of October, November and December 2008, when delivery of the contractual quantities of MFO ought to have been accepted over each of the months of

October, November and December 2008 by the defendant, as pleaded in para 13 of the amended statement of claim, amounting to USD25,131,201.12.

[12] As a fourth alternative claim, damages may be assessed as special damages amounting to USD26,654,602.71. In consequence of the defendant's breach of contract and wrongful repudiation of the Marinehub/the defendant FPC, Marinehub was unable to perform its obligations owed to the plaintiff under the Marinehub/the plaintiff FPC. Accordingly, Marinehub failed to accept delivery of the contracted quantities of MFO under the Marinehub/the plaintiff FPC, causing Marinehub to:

(a) suffer loss of profit, being the price differential between Marinehub/the defendant FPC and Marinehub/the plaintiff FPC of USD189, 209.90; and

(b) be liable to the plaintiff for breach of the Marinehub/the plaintiff FPC, in the sum of USD26,465,402.81 as pleaded in para 14 of the amended statement of claim.

THE DEFENDANT'S CASE

[13] The defendant denies the applicability of English law to this proceedings and contended that s 50(3) of the English Sale of Goods Act 1979 does not apply.

[14] It is the defendant's case that English law applies to issues relating to the interpretation of the said contract and the substantive issues under the said contract which is known as the *lex causae*. However, the process of measuring the damages for any consequences of breach of the said contract is an issue that is determined based on the law of the jurisdiction that parties had agreed to, here the *lex fori* being Malaysia.

[15] Thus, the defendant contended that the losses that can be claimed by the plaintiff, as Marinehub's assignee would be limited to the losses actually incurred by Marinehub and that these losses must be strictly proven and such losses should have been mitigated by Marinehub.

THE LAW GOVERNING THE RECOVERABILITY OF DAMAGES

[16] The core issue to be determined by the court is whether the Malaysian law or English law is applicable to the assessment of damages in the present case.

[17] The plaintiff claimed damages for the defendant's breach of contract for the following: A

(a) non-acceptance of delivery of bunkers, MFO; and

(b) wrongful termination of the FPC dated 16 September 2008. B

[18] As a result of the breach, the plaintiff seeks damages based on the differential in market price and the FPC contract price for the 82,265mt of MFO unlifted by the defendant for the months of October, November and December 2008. C

[19] I begin with an outline of the rival arguments.

[20] While it was common ground between the parties that the substantive contract between them was governed by English law, the plaintiff contended that the damages which they were entitled to recover in the particular circumstances of the case is also to the determined in accordance with the principles of English law. In support of the plaintiff's contention, learned counsel for the plaintiff referred to the following authorities: D

(a) in *James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party)* [1996] 2 MLJ 97, Peh Swee Chin FCJ (as he then was) sitting as a High Court Judge said as follows: E

> The court now looks into this question of proper law of contract. F
>
> In a case like the present one involving these two contracts, foreign elements are involved, so that they are international contracts notwithstanding the narrow causeway separating Malaysia and Singapore.
>
> Every international contact has a governing law which determines the validity, interpretation, rights and obligations etc of such contract. Such governing law is called the proper law of contract. G
>
> Now, if the parties to such a contract have stipulated for a proper law of contract or words giving the same effect then they have made an express choice of it.
>
> Where, however, they have not made such an express choice, then in my opinion, the proper law of contact will be according to the modem view as formulated by Lord Simmonds in *Bonymon v Commonwealth of Australia* [1951] AC 201 at p 209 in the Privy Council. H

(b) *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396, Syed Ahmad Idid J (as he then was) stated that: I

> The recent judgment of the Court of Appeal in *England, The Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd & Ors* is against the plaintiffs. This court agrees with the decision despite Mr Alex Decena's attempt to distinguish that decision.

A Lord Golf of Chiveley in *Dimskal Shipping Co SA v International Transport Workers Federation* expresses the opinion that '… if a person enters into such a contract (ie one governed by some other system of law), he has for most purposes to accept the regime of the proper law of the contract …

B Whether the proper law applicable is the lex contractus or the lex solutionis is a matter of presumption and where the parties have expressed themselves (as here) the intention so expressed overrides presumption.

(c) *Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor* [2011] 2 MLJ 59, Azahar Mohamed J (now JCA) said:

C It is common ground that the applicable law of contract in relation to the said licence agreements is that of the State of Illionis, USA. This is pursuant to para 13 of these agreements. It is settled that such a choice of law clause does not prevent Malaysian courts from having the jurisdiction and ability to adjudicate on the said four licence agreements. In *American Express International Banking Corp v Tan Loon* D *Swan* [1992] 1 MLJ 727 our then Supreme Court held if it is necessary for a court in this Country to form an opinion upon a point of foreign law, s 45 of the Evidence Act 1950 (the EA') can be applied. Section 45(1) of the EA provides that when the, court has to form an opinion upon a point of foreign law, the opinions upon that point of persons specially skilled in that foreign law are relevant facts; and such E persons are known as experts.

(d) *American Express International Banking Corp v Tan Loon Swan* [1992] 1 MLJ 727 where the Supreme Court said:

F The defendant has clearly submitted to the jurisdiction of the courts in this country and in any case we see no reason why a court in this country where the defendant resides is not the forum conveniens, and even if it is necessary for a court in this country to form an opinion upon a point of foreign law, s 45 of the Evidence Act 1950 can be applied. The second preliminary objection by the defendants counsel G was therefore overruled.

[21] The defendant countered by submitting that even in a case where the substantive contract was governed by English law, procedural or remedial questions, which included the question of damages, ought to be determined H according to *lex fori*, in this case, the law of Malaysia.

[22] Both parties relied on the Federal Court case in *Chan Kwon Fong & Anor v Chan Wah* [1977] 1 MLJ 233 to support their contention. Thus, it is pertinent to refer to the judgment of the Federal Court in more detail. I Delivering the decision of the Federal Court in *Chan Kwon Fong*'s case, His Royal Highness Raja Azlan Shah said as follows:

…it is here we must be carefui to consider two separate issues — jurisdiction and the choice of law, for they are logically distinct and separate …

Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive — the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain or suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by the lex fori (see the speech of Lord Hodson in *Boys v Chaplin*, at pp 378–379).

Accordingly our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction in personam over the defendant …

[23] His Lordship cited and relied on Lord Hodson's judgment in *Boys v Chaplin* [1971] AC 356 which held as follows:

I am now, however, persuaded that questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only. This view is supported by authority. The Supreme Court of Canada in *Livesiey v Horst* [1925] 1 DLR 159 held that the question what kind of loss actually resulting from a breach of contract is actionable is a question of law. The court, at p 161, cited and relied upon a passage from the judgment of Turner LJ in *Hooper v Gumm* (1867) 2 Ch App 282, 289 which reads:

… where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so …

This statement excludes procedure, for the party invoking English law must take procedure as he finds it.

… The Supreme Court of Canada in *Livesly v Horst* [1925] 1 DLR 159 held that the question what kind of loss actually resulting from a breach of contract is actionable is a question of law. The court, at p.161, cited and relied upon a passage from the judgment of Turner LJ in *Hooper v Gumm* (1867) 2 Ch App 282, 289, which reads:

… where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so.

English law is the lex fori. Lex fori must regulate procedure because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the lex fori must regulate remedies, because the court can only give its own remedies, having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible Future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court.

[24] Counsel for the defendant also relied on the case of *Jupiter Ltd v Lim Kin*

Tong (Trading as Conrad International Treasury Casino) [2005] MLJU 534; [2006] 5 CLJ 277 (HC) to support the defendant's contention that Malaysian law is applicable to the assessment of damages in this case.

[25] In *Jupiter*'s case, Ramly J (now JCA) stated as follows:

> … the law of Queensland, Australia is irrelevant to any claims for gaming debts in Malaysia. No action for gaming debt can be brought or maintained in Malaysia. That being so them is no reasonable cause of action on which this court can grant any form of relief. The action must be shot down at the outset. To persist and 'maintain' the action is an abuse of the process of the courts.

[26] The issue in *Jupiter* case was whether there could be brought before the Malaysian court a cause of action for recovery of an illegal gaming/betting debt contrary to s 26(2) and (4) of the Malaysian Civil Law Act 1956. Besides, a debt case, the court does not consider heads of damages or remoteness. Thus, I am of the view that *Jupiter*'s case is not applicable to this present case, where damages is an issue.

[27] The leading contract case in the English common law relating to assessment of damages which was referred to by learned counsel for the plaintiff is *J D'Almeida Araujo Lda v Sir F Becker & Co* [1953] 2 QB 329. In that case there was a contract governed by a foreign law (the law of Portugal) and it was argued by the defendant that all matters relating to damages ought to be decided by application of English law as the *lex fori* (the case was being heard in an English court). This argument was rejected by the court. The court referred extensively to passages in *Dicey on Conflict of Laws* (then in its (6th Ed)) and *Cheshire on Private International Law* (then in its (4th Ed)) and also to an earlier decision of the Supreme Court of Canada, *Livesley v Horst* [1924] SCR 605, which had held that the question of damages before the court in that case should be determined by applying the law governing the substantive rights under the contract (the *lex causae* or proper law).

[28] In this present case, I was also referred to a number of textbooks on the particular point whether in a foreign contract, the issue of damages is in the words of some of the textbook writers, 'a procedural of remedial matter such as falls to be determined in accordance with the lex fori or whether, on the other hand, it is part of the substantive contract between the parties and so to be determined in accordance with the lex luci contracts'.

[29] In *Cheshire, North & Fawcett on Private International Law*, (14th Ed), at p 96, the passage states as follows:

(i) Remoteness of damage

There can be no doubt, at least in principle, that remoteness of damage must be governed by the law governing the obligation that rests on the defendant. Both the existence and extent of an obligation, whether it springs from a breach of contract or the commission of a wrong, must be determined by the system of law from whhic it derives its source. The governing law admittedly determines the nature and content of the right created by a contract, and it is clear that the kind of loss for which damages are recoverable on breach forms part of that content. Both the nature and the content of the contractual right depend in part on the question whether certain consequential loss that may ensue if the contract is unperformed will be too remote in the eye of the law. If the governing law determines what constitutes a breach, it also determines the consequences of a breach.

… In the present action, the plaintiff claimed to recover by way of damages the £3,500 which they had been obliged to pay under the indemnity. It was admitted that according to English law the loss suffered by reason of this payment would found no claim to damages, since it was not the land of loss that ensued in the usual course of things from such a breach of contract. The judge, however, held that English law was irrelevant, concluding that the question whether the plaintiffs were entitled to claim from the defendants the £3,500 which they paid to Mourao, depended on whether such damage were too remote, a question which fell to be determined in accordance with Portuguese law.

(iii) Measure of damages

The next question is by what law is the measure of damages governed? A rule as to the measure of damages in the narrow sense is a mere rule of calculation. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be a tort or breach of contract, for which his liability has already been determined by the governing law …

Reference to the issue of measure of damages to the law of the forum will mean that if, for instance, the defendant pleads a tender of the amount due, he must prove that the tender is in accordance with English law. This is because if the task of the court is to fix the amount payable it must also be competent to decide whether in its view payment has in effect already been made. Furthermore, the question whether the damages should be paid in a lump sum or by means of periodic payments is a procedural matter for the law of the forum.

[30] *Dicey & Morris on Conflict of Laws*, (14th Ed) at paras 32–202 summarises the common law position:

In English law a distinction is drawn between rules relating to remoteness and recoverable heads of damage, which are questions of substance governed by the lex causae, and rules relating to the measure or quantification of damage, which are questions of procedure governed by the lex fori. It is probable that, in the field of contractual obligations, this distinction survives the 1990 Act. In *D'Almeida Arauio Lda v Sir Frederick Becker and Co Ltd* Pitcher J rejected the argument that all questions of damages were for the lex fori; it was held that in a claim for breach of

A contract the question whether the plaintiffs could recover sums paid to third parties (by way of indemnity for breach of contract) was a question of remoteness to be decided according to Portuguese law (the law governing the contract), and not merely a question of the quantification in contract claims of part of the loss which the plaintiffs had in fact sustained, which would have been for English law as the lex fori to determine.

B

[31] The current edition of *Cheshire, North & Fawcett on Private International Law*, the (14th Ed), also refers to the *D'Almeida* case and is essentially the same effect. It states that there can be no doubt that the question of remoteness of damage (ie what types of loss may as a matter of law be compensated for by an award of damages) is governed by the law governing the obligation that rests on the defendant (the *lex causae* — which in a contract case, is the proper law of the contract). It further states that, in contract cases, there is little doubt that the question of what heads of damage are legally recoverable is also a substantive issue to be decided applying the law governing the contract.

C

D

[32] *Cheshire* goes on to explain that, although a distinction between remoteness of damage and measure of damage is not easy to apply, on authority it is a valid one. It explains that this means that questions of quantification or calculation of damages, that is, how to quantify or calculate in money terms the amount of damages to be paid in respect of an otherwise recoverable type or head of loss, are treated as procedural matters along with, for example, the mode of proof of facts, and issues such whether there has been a valid tender, or whether damages must be ordered once-and-for-all or can be ordered in installments. According *Chesire*, these procedural questions are governed, not by the 'proper law' of the contract, but by the *lex fori*.

E

F

G

[33] In this regard, whether general damages or special damages are recoverable in this instance under foreign law, and what items falls within each of these classes of damages, whether it be an item of market differential or Marinehub's loss of profits or indemnity for liability to the plaintiff, and how these items are defined are questions on the determination of the type or kind of loss, or heads of damages that is considered to be recoverable. I am clear in my mind that the question what kind of loss actually resulting from a breach of contract is actionable is a question of law (ie substantive right). It is certainly not an issue of quantification of damages. In this present case, if it is a question of remoteness or type of loss, English law as the proper law must define the limits of each head of damages.

H

I

[34] The *D'Almeida* case illustrates this; as seen in the reasoning of Pitcher J below:

> … on whether the £3,500 which the plaintiffs have had to pay to Moumo is a head of damage which is recoverable or not on principles of remoteness of damage, or whether it is to be regarded as a mere established quantification of a part of the loss the plaintiffs have in fact sustained …
>
> I conclude that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to Moumo, depends on whether such damage is or is not too remote. In my view, the question here is one of remoteness, and therefore falls to be determined in accordance with Portuguese law.
>
> The two Portuguese lawyers who were called on either side were agreed on a number of matters. They were agreed that it was unnecessary under Portuguese law in cases of breach of contract for the innocent party to show that the damages which he had sustained were damages which must have been in the contemplation of the defaulting party. They were, as I understood it, also in agreement that the words In the article, 'necessarily resulting', limited the damages recoverable to such damages as flowed 'directly, exclusively, immediately,' and, I think, 'unavoidably from the breach'.

[35] To my mind, the judgments in *D'Almeida* speak for themselves and do not require elaboration. On reading them, the impression which I formed was that *D'Almeida* case is an authority in point. By contrast, the defendant's reason cannot be accepted.

[36] Thus, based on the above cited authorities, I am of the view that the question whether the plaintiff is entitled to claim from the defendant as prayed in the amended statement of claim, depends on whether such damage is or is not too remote.

[37] I must stress, the question here is of remoteness and therefore falls to be determined in accordance with English law.

[38] Having decided that English law is applicable to the assessment of damages pursuant to s 13 of the contract, it is settled law that such a choice of law clause does not prevent Malaysia courts from having the jurisdiction and ability to adjudicate on the assessment of damages. (*Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor* [2011] 2 MLJ 59 followed).

EXPERT OPINION

[39] I therefore turn next to consider whether the plaintiff is entitled to recover the sum pleaded in its' amended statement of claim under English law.

[40] In this regard, the plaintiff called Graham Dunning QC ('PW4') to assist the court on understanding the proper head of damages recoverable by the plaintiff under English law by an innocent seller for non acceptance of

goods by a buyer. PW4 has been practicing for the past 28 years as barrister in England appearing in the Commercial Court, Chancery Division of the High Court in London and Appellate Court. He also acts in commercial and international arbitrations both as counsel and arbitrator, and is a member of the London Court of International Arbitration and a member of the British Maritime Law Association.

[41] The defendant however did not call any expert witness on English law on this point.

[42] The opinion of PW4 may be summarised as follows:

(a) *General Damages*: As assignee of the FPC, the normal head of the plaintiff's damages against the defendant for non-acceptance of goods is general damages, namely the difference between the FPC price and the market price. This head is recoverable as a matter of law under s 50(2) and (3) of the English Sale of Goods Act 1979, assuming that there was an available market for the goods at Singapore.
It does not matter that Marinehub did not purchase the MFO from the plaintiff, nor that it did not in fact sell the MFO to alternative buyers after the FPC was broken and then terminated.

(b) *Special Damages*: Depending of what facts the court finds as proven, the plaintiff may in the alternative be able to claim special damages from the defendant in respect of:

(i) the loss of profit suffered by Marinehub on the FPC (being the difference between the Marinehub/the plaintiff FPC price and the Marinehub/the defendant FPC price); and

(ii) Marinehub's liability to the plaintiff which, again, is measured against the market.

(c) The two aspects of special damages — loss of profits and legal liability — go hand in hand. So, if one (loss of profits) is recoverable, as the defendant contends, then the other aspect, legal liability, must also be recoverable. This was particularly explained by Viscount Dunedin in *Hall v Pim* (1928) 30 Ll L L Rep 159 where he said at p 162:

> The result of the default which did ensue was two-fold. The appellant lost his profit, but also he had to pay damages to his buyer. It is argued that although there may be liability for the first item, there could not be for the second. Rowlatt J, held that the two were inseparable. The Court of Appeal did not have to consider the point. In my opinion the one is the corollary of the other …

(d) s 50(1) provides that an action for damages for non-acceptance may be brought when the buyer wrongfully neglects or refuses to accept and pay

for the goods. Section 50(2) provides that the legal rule of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract — this is essentially a statutory recitation of the first limb of the well known rule in *Hadley v Baxendale*, the leading common law case on damages for breach of contract. By way of application of this measure, s 50(3) of the 1979 Act sets out the applicable general rule under English law where there is an 'available market for the goods in question';

(e) if there is an 'available market' and a buyer wrongly fails to accept the goods (as occurred in this case), the seller's damages are calculated by deducting the contract price from the market price at the time and place fixed by the contract for acceptance. Thus, the defendant's liability is for the difference between the FPC price and the market price at the time and place (ie Singapore) fixed by the FPC for acceptance of the MFO;

(f) in *Aercap Partners v Avia Asset Management* [2010] EWHC 2431, Gross LJ stated at para 106 that the rationale of s 50 'is helpfully summarised in *McGregor on Damages* (18th Ed), at paras 20–112'. The first two sentences of that paragraph read as follows:

> The normal measure of damages, as stated in s 50(3) thereby incorporating the common law …is the contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been in had the contact been carried out, since he can sell the goods in the market.

(g) there might not be an immediate market for the whole quantity of the goods at the time of breach. In such circumstances, the court will consider the closest point in time after the breach when a market could have been established by selling the goods. This is the primary way that the plaintiff has pleaded its claim in para 11 of the statement of claim. It has pleaded that it would have taken from 1 to 7 November 2008 to dispose of the MFO that the defendant should have accepted in October 2008, and from 14 November to 14 December 2008 to dispose of the MFO that the defendant should have accepted in November and December 2008, and it has applied the average market price during these periods to the relevant quantities.

(h) *Available Market*

The concept of an 'available market' was discussed in *Petrotrade v Stinnes* [1995] 1 Lloyd's Rep 142. In that case, the defendant had refused to take delivery of the consignment of 10,000mt of a particular specification of gasoline, which could not be sold m one lot immediately on the occurrence of the breach of contract. The court said at pp 152–153:

> There can be no doubt that the starting point is to ask whether there

> was an available market. On the facts which I have found, the limited demand for this product which meant that it would take two weeks to sell all of it does not mean, in my, judgment, that the market was not 'available' within s 50(3). It was indeed 'available' because the price of the product was regulated by supply and demand at the material time and because a seller acting with reasonable determination could have disposed of at least some of the gasoline at that time and of the balance within a mere two weeks. It is perfectly true that one could not arrive at the final loss figure until the whole parcel had been sold, perhaps at differing prices, over that period and so one could not appropriately identify as the market price for this quantity of product the price ruling on July 20 — the day when, on Petrotrade's case, the gasoline ought to have been accepted — but the words 'prima facie', in my judgment, introduce sufficient flexibility into the test under s 50(3) to justify calculation of the loss in a case such as this by taking a weighted average of the prices that would have been obtained during the minimum period that it would have taken a reasonable oil dealer acting with reasonable expedition to sell the entire parcel as the relevant market or current price which would provide the yardstick under s 50(3). To the extent that such price is below the contract price, that is the measure of damages. I do not believe there to be anything inconsistent in principle between that approach and the judgment of Lord Justice Jenkins in *Charter v Sullivan* [1957] 2 QR 117 at p 128.

(i) The relevant 'available market' is determined by considering the market available to Marinehub in the circumstances in which it is placed by the breach. To support his contention, PW4 referred to the following judgment by Gross LJ in the *Aercap Partners Ltd v Avia Asset Management AB* case, mentioned above, at para 109(i):

> Although the seller is required to make a substitute contract, the law gives the seller a reasonable period of time to make the substitute sale; the relevant market price for the purpose of assessing the quantum of the recoverable loss is the market price at the expiration of that period.
>
> However, what is a reasonable time to establish a market is a matter for this court to determine based on the evidence adduced by parties.

(j) *Relevant Date*

Section 50(3) of the 1979 Act provides that the 'market or current price' is to be taken 'at the time or times when the goods ought to have been accepted'. This is a reflection of the general principle that damages are usually assessed as of the date of breach. In the case of goods due for delivery in installments, the market value is in principle calculated by

reference to the date on which each installment was to be delivered under the contract; in this case, October, November and December 2008.

(k) *Cost of Purchase*
By reference to paras 24–29 of first opinion PW4 testified that as a matter of English law, the cost of Marinehub's purchase of MFO is irrelevant in assessing damages under s 50 of the English Sale of Goods Act

(l) Where damages are assessed against the market, it is irrelevant at what cost Marinehub could or would have acquired the marine fuel oil with which to sell on to the defendant. What the seller in the position of Marinehub has lost as a result of the contract not being performed by the buyer is the benefit of the buyer's promise to take delivery. The object of the award of damages is to compensate the seller for the loss of the benefit of that promise. It is entirely irrelevant to the exercise of assessing that compensation at what pnce the seller had acquired, or was intending to acquire, the goods. This is in accordance with the rationale of the market differential head of damages as explained in Chitty: 'This, represents the amount the seller must obtain to put himself in the position he would have been in had the contract been carried out, since he can sell the goods in the market.'

(m) *Replacement Sales*
If the normal measure of damages is applied under ss 50 (2) and (3) of the English Act, it is irrelevant that Marinehub did not enter into replacement sales. Marinehub was under no duty to go into the market to make alternative saies of the contracted quantities of marine fuel oil; a court will assess Marinehub's damages as if it had gone into the market after a reasonable period of time and resold the goods (hence the normal contract/market difference measure). As the measure is applied on the basis that the innocent party had gone into the market, it is irrelevant whether he did or not.

[43] Relying on the opinion of PW4, learned counsel for the plaintiff submitted that as a matter of principle, under English law a claimant cannot recover damages for any part of his loss caused by the defendant that he could have avoided by taking reasonable steps. A claimant's damages will be calculated on the assumption that the claimant has acted reasonably to minimise his loss. As such, the plaintiff argued that the effect of the principle is to restrict Marinehub's damages claim to those losses that Marinehub suffered as if it had acted reasonably to mitigate its loss by going into the market and selling. In other words, the normal measure of damages under s 50(3) has the mitigation principle built into it. Thus, according to the plaintiff the court therefore does not need to enter into a separate inquiry on mitigation if market differential is the head of damages awarded.

[44] Learned counsel for the plaintiff also referred to recent authority in the English Commercial Court on this point: *Westbrook Resources Ltd v Globe Metallurgical Inc* [2007] EWHC 2353 (Comm), 16 October 2007. Tomlinson J (as he then was, now Lord Justice Tomlinson) held that:

> there was an available market and that the connect measure of damages for the seller when the buyer failed to take delivery was the difference between the contract price of the goods and the market price at or shortly after the buyer's breach; this measure compensated the seller for the loss of the contract, regardless of whether he went ahead and sold the goods at that price. It is trite law that subsequent action or inaction by the seller in relation to that transaction is irrelevant because it was not caused by the original buyer's breach of contract …(the seller's) subsequent decisions and the manner of their ultimate disposal of the goods are not matters which resulted directly and naturally from (the buyer's breach of contract).

[45] I have reviewed PW4's opinion, and I am inclined to agree with his opinion. I think this is a good opinion and it is undoubtedly the correct view. In my view, the plaintiff is entitled to recover from the defendant damages based on the differential in the market price and the FPC contract for the 82,265 mt unlifted by the defendant for the months of October, November and December 2008 (based on the plats Bunkerwire market rate). My reasons are as follows.

[46] Section 50(1) of the English Sales of Goods Act 1979 provides that an action for damages for non-acceptance may be brought when the buyer wrongfully neglects or refuses to accept and pay for the goods. Section 50(2) provides that the legal rule of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract — this is essentially a statutory recitation of the first limb of the well known rule in *Hadley v Baxendale*, the leading common law case on damages for breach of contract. By way of application of this measure, s 50(3) of the 1979 Act sets out the applicable general rule under English law where there is an 'available market for the goods in question'.

[47] Thus, if there is an 'available market' and a buyer wrongly fails to accept the goods (as occurred in this case), the seller's damages are calculated by deducting the contract price from the market price at the time and place fixed by the contract for acceptance. Hence, the defendant's liability is for the difference between the FPC Price and the market price at the time and place (ie Singapore) fixed by the FPC for acceptance of the MFO.

[48] As pointed out in a recently reported case, *Aercap Partners v Avia Asset Management*, Gross LJ stated at para 106 that the rationale of s 50 'is helpfully summarised in *McGregor on Damages* (18th Ed), at paras 20–112'. The first two sentences of that paragraph read as follows:

> The normal measure of damages, as stated in s 50(3) thereby incorporating the common law … is the contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been in had the contact been canied out, since he can sell the goods in the market.

[49] However there might not be an immediate market for the whole quantity of the goods at the time of breach. In such circumstances, the court will consider the closest point in time after the breach when a market could have been established by selling the goods.

MALAYSIAN LAW ON HEADS OF DAMAGES

[50] For the sake of completeness, it is necessary to discuss the position of the Malaysian law on measures of damages for breach of contract in this country.

[51] Section 50(1) of the English Sales of Goods Act 1979 is identical to s 56 of the Malaysian Sales of Goods Act 1957 which provides that where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance. The Malaysian Sale of Goods Act 1957 however, does not provide the equivalent of sub-s 50(2) and (3) of the English Sale of Goods Act 1979. However, Malaysian law on the relevant head of damages recoverable for non-acceptance of goods arrives at the same conclusion as English law, drawing on s 74 of the Contracts Act 1950. Section 74 provides:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation as for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the partes knew, when they made me contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach.

[52] Illustration (c), (d) and (o) to s 74 of the Contracts Act 1950 are of assistance.

> Illustration.
>
> (c) A contacts to buy of B, at a stated price, 50 gantangs of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
>
> (d) A contracts to buy B's ship for RM60.000, but breaks his promise. A must pay to

B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(o) A contracts to deliver 50 gantangs of saltpetre to B on the 1st of January, at a certain price. B afterwards, before the 1st January, contracts to seil the saltpetre to C at a higher price than the market price of the 1st of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the 1st of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

[53] This approach under Malaysian law is expressed in *Halsbury's Laws of Malaysia*, Vol 24, on Sale of Goods:

(410.253) When remedy available — Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance …

(410.254) Measure of damages — The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. This is the ordinary rule of the ascertainment of damages for breach of contract, but it can be displaced by the express terms of the contract itself, as where damages for breach are fixed by the contract, but they must be such as plainly to show that it is intended to displace the rule.

… There is no specific provision in the Sale of Goods Act 1957 (Act 382) on the measure of damages, however, the courts refer to the Contracts Act (Act 136) 1950 Section 74 which embodies the common law principles derived from *Hadley v Baxendale* [1854] 9 Exch 341, 23 UEx 179 …

(410.255) Market-price rule for ascertaining measure of damages — Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contact price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, at the time of the refusal to accept.

This rule is founded on the general duty of the seller to mitigate his damage by taking all reasonable steps to minimize his loss, and, where in breach of contact for the sale of goods a buyer refuses to accept or pay for them, the reasonable step for the seller to take in normal circumstances is to sell the goods for the best price that he can. The difference between the market or current price at which he sells them and the contract price which he would have obtained for them is the true measure of the damages consequent on the buyer's breach of contract.

[54] This position is supported by the following Malaysian decisions. In *Lee Heng & Co v C Melchers & Co* [1963] 29 MLJ 47 the Court of Appeal, Malaysia, Thomson CJ held that:

… The measure of damages in such a case is normally the difference, if any, between the market value of the goods supplies and the market vaiue of the goods ordered, both values being taken as at the date of delivery. This is not because of anything

contained in sub-s (3) of s 53 of the Sale of Goods Act 1893, for there is no corresponding sub-section in s 59 of our Sale of Goods Ordinance. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. That law is set out in s 74 of the Contracts (Malay States) Ordinance which is the same as s 73 of the Indian Contract Act, which was held by the Privy Council in the case of *Jamal v Dawood* to be merely declaratory of the English common law relating to damages.

The English rule is thus stated by Kelly CB in the case of *Engell v Fitch*:

The measure of damages is the difference between the contract price and the value at the time when the contract was broken.

From such cases as *Rodocanachi v Milburn* and Williams v Agius it is clear that where the contract relates to goods for which there is market the measure of damages is the difference between the contact price and the market price at the contracted date of delivery …

[55] In *East Asiatic Co Ltd v Othman* [1966] 2 MLJ 38 Abdul Aziz J (as he then was) said:

In this case the plaintiff applied by way of motion for the assessment of the damages suffered by the plaintiff as a result of the defendants breach of agreement to take delivery of a new Fiat 1100 D Saloon in March 1965. Evidence as adduced by the plaintiff showed that the defendant placed an order for the purchase of one Fiat 1100 D motor car on 9 December 1964 at a cost of $6,498 to be delivered some time in March 1965. The defendant having defaulted in taking delivery of the car the plaintiff sued the defendant for breach of contract and claimed damages for breach of contract …

In my view the case falls to be determined by s 56 of the Sale of Goods Ordinance 1957 and s 74 of the Contracts (Malay States) Ordinance 1950. Section 56 reads:

Where the buyer wrongfully neglects or refuses to accept and pay for the goods ordered by him the seller may sure him for damages for non-acceptance.

and the measure of damages is governed by s 74(1) which reads:

74(f) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The general purpose of the law is to give compensation, that is to put the plaintiff in as good a position as he would have been had the defendant performed the contract and the law speaks of compensation and not damages. Therefore the plaintiffs must show that they have suffered some loss or damage before compensation can be awarded. The plaintiffs contention, with which I agree, was that they suffered loss and the loss was the loss of bargain which they would have made if there was no breach — the loss being the difference between the sale price of the car and the price at which the car was eventually sold. The plaintiff contends (and the defendant is

not here to refute it) that such make of car is not readily sold in the market and from the past experience of the company only three to five units could be sold per month.

In *Lee Heng & Co v C Melchers & Co* it was held that where the contract relates to goods for which there is a market the measure of damages is the difference between the contract price and the market price at the contracted date of delivery.

In *Lee Hin v Mohamed bin Abu bakar* it was held that the damage which naturally arose from the respondent's breach was the plaintiff's loss of bargain, the measure of which would normally be the difference between the market value and the contract price. In the present case it was the plaintiff's contention that there was no available market.

In *Thompson Ltd v R Robinson Ltd*. The question as to what is an available market was considered … Upjohn J said:

Had the matter been res integra, I think I should have found that an 'available market' merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold and that there was a demand sufficient to absorb readily all goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of …

[56] The measure of damages was also discussed by the Supreme Court in *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 where the court held as follows:

… In considering the above question, it is important to bear in mind that the nomtal measure of damages for breach of contact in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* (1854) 9 Ex 341 (*Teoh Kee Keong v Tambun Mining Co Lrd* [1968] 1 MLJ 39; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76 (SC). In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v Baxendale*, which is, the party may recover damages which may reasonably be supposed to have been in contemplation of both the parties, at the time they made the contact see *Associated Metal Smelters Ltd v Tham Cheow Toh* [1971] 1 MLJ 271. The English equivalent our s 74(1) is s 50(2) of the Sale of Goods Act 1979, which was framed in terms of the first rule in *Hadley v Baxendale* (*McGregor on Damages* (15th Ed), at para 835). Thus, s 50(2) states that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract If there is clearly no available market, then, consequential loss apart, the damages will be assessed at the contract price less the value of the goods to the plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold (*ibid*, at para 836). Any relevant evidence may be admissible to prove this value (*Benjamin's Sale of Goods* (4th Ed), at paras 16–068).

[57] Hence, under s 56 of the Malaysian Sale of Goods Act and s 74 of Contracts Act, the heads of damages recoverable would be the market differential between the contract price and the market price prevailing at the time of breach; ie when the goods ought to have been accepted — the same position as under English law. If there is no market available, the price at actual resale is indicative of the value of the goods at the time of breach.

[58] Although the end result is the same under Malaysian law and English law, counsel for the plaintiff submitted that the 'route' by which the court arrives at this cdnclusion is different — English law uses s 50(2) and (3) of the Sale of Goods Act 1979, whilst Malaysian law uses the Sale of Goods Act 1957 and the Contracts Act 1950. On this issue, the court accept the plaintiff's argument that as the parties have expressly chosen English law as the proper law of the contract, this court must give effect to this contractual choice by applying the English 'route' in determining the heads of damages as a matter of substantive rights of the parties.

[59] Thus, based on the opinion and authorities cited by PW4 in his opinion which I accepted, the plaintiff is entitled to damages based on the contract market price as the appropriate head of damages, pursuant to s 50(3) of the English Sale of Goods Act, as prayed in its' amended statement of claim.

TIME FOR DISPOSAL

[60] The court needs to consider the appropriate time at which the market for 82,265mt MFO is established as being available, to ascertain the proper price to be accepted as the market price in this instance, in computing the sum of money payable in damages.

[61] The evidence of PW3 is clear that in a declining market such as that in November and December 2008, 82,265mt of MFO could not be disposed of in one lot. Buyers and traders were cautious to see if the price would decline further. This too was not challenged by the defendant in cross-examination. Thus, this court accepts that it would have taken a period of time to dispose the 82,265mt of unlifted MFO in the Singapore market, and that a corresponding period of time would establish the available market, and hence the relevant market price for computing damages.

[62] This is supported further by the fact that:

(a) individual orders by the defendant for the lifting of MFO under the FPC were in small parcels; the entire 34,200mt was not delivered to the defendant in one lot. It took the defendant more than three weeks in October 2008 to lift 20,400 mt of MFO under the FPC; and

(b) testimony of DW1, that the defendant's vessels could require even less than 300 mt of MFO to be supplied, confirming that it is the norm to trade MFO in small parcels, as testified by PW3 and PW2.

[63] The evidence of PW3 that it would therefore take a reasonable trader two to three weeks to dispose of the 34,200mt of MFO unlifted by the defendant in each of the respective months of November and December 2008, and one week to dispose 13,862 mt of the October unlifted quantities, under the conditions prevailing in November and December 2008, is unchallenged by any contrary expert evidence. Thus, the court accepts his evidence as it also appears to be reasonable.

PLATTS BUNKERWIRE OR MEANS OF PLATTS MARKETSCAN

[64] Next, the court will have to determine which of the two published rates for the purpose of computing the amount payable by the defendant in damages, under para 11 of the amended statement of claim. The plaintiff submitted that the means of Platts Marketscan should be the preferred measure of market rates. Clause 3.3 that makes reference to Platts Bunkerwire was found by the Court of Appeal to be inapplicable to the FPC. Further, it was argued that the correspondence from pp 42–60 of bundle B, between the defendant and Marinehub were based on this disputed cl 3.3. According to the plaintiff, the correspondence made reference to Platts Bunkerwire in an attempt to compromise the dispute, as testified by PW1 and confirmed by DW1. Thus, the plaintiff submitted that the correspondence does not evidence reliance on, nor agreement by the parties to, the use of the Platts Bunkerwire rates.

[65] With regrets the court cannot accept this argument. My reason follows.

[66] In para 14 of the amended statement of claim the plaintiff claims USD26,465,402.81 which the plaintiff alleged is the difference in the contract price less the average market price in respect of the periods that it disposed off the MFO.

[67] It is pertinent to note that when the dispute arose, both Marinehub and the defendant had negotiated an attempted settlement based on the Platts Bunkerwire index. All the correspondences between the parties refer to the Platts Bunkerwire index. The correspondences refer to the Platts Bunkerwire index are as follows:

(a) email from the defendant to Marinehub dated 24 October 2008 — p 41, bundle B;

(b) email from Marinehub to the defendant dated 10 November 2008 — p 61, bundle B;

(c) email from the defendant to Marinehub dated 10 November 2008 at 3.52 pm — p 61, bundle B;

(d) email from the defendant to Marinehub dated 10 November 2008 at 4.15 pm — p 61, bundle B;

(e) email from Marinehub to the defendant dated 11 November 2008 — p 60, bundle B; and

(f) email from the defendant to Marinehub dated 11 November 2008 — pp 59–60, bundle B.

[68] The court cannot accept the plaintiff's contention that the reason why the Platts Bunkerwire index is referred to in the said emails was because of the defendant's reliance on cl 3.3. Based on the evidence adduced, it is noted that Marinehub had already rejected cl 3.3 and had proposed a settlement that would rely on the Platts Bunkerwire index.

[69] On this issue, the court is of the view that based on the circumstances of this case, the more appropriate index to use would be the Platts Bunkerwire index instead of marketscan index as claimed by the plaintiff in its' amended statement of claim.

[70] Thus, the court finds that there is no credible evidence adduced by the plaintiff to suggest that the marketscan index is more likely to be used than the other.

[71] Further, the court agrees with the defendant's contention that the argument that Means of Platts is common and popular is surely not convincing when PW2 who had been involved in the trading of MFO since 1996 only instructed the claim to be amended to include this new index two years after the writ of summons was filed and after judgment on liability had been entered. At the point when the High Court and the Court of Appeal heard arguments on liability, the only index pleaded in the statement of claim was the Platts Bunkerwire index, which the plaintiff now claims is less accurate.

[72] Thus, the court views that the actual loss that has been proven by the plaintiff through PW2 is the appropriate approach measure of damages i.e. the general damages.

CONCLUSION

[73] In conclusion, the plaintiff has established its claim for damages. Based on the foregoing reasons, the calculation of general damages that the court awards are as follows:

Period	Average Market Price (USD/mt)	Difference (USDp/mt)	Quantity (mt)	Amount (USD)
(a) October 2008	257.10	302.70	12,155.174	3,679,371.17
(b) November–December 2008	227.90	331.90	64,980.00	21,566.862.00
Total award	**25,246,233.17**			

[74] Thus, the plaintiff's claim in para 11 of the amended statement of claim is allowed for the sum of USD25,246,233.17 with interest at the rate of 8% per annum from 19 November 2008 until the date of realisation in accordance with the judgment dated 23 September 2009 with costs.

Plaintiff's claim allowed with interest and costs.

Reported by Kohila Nesan